



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212, 237, and 252**

**[Docket DARS-2021-0021]**

**RIN 0750-AK47**

**Defense Federal Acquisition Regulation Supplement: Requirement for Firms Used to Support Department of Defense Audits (DFARS Case 2019-D010)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019, as amended by a section of the National Defense Authorization Act for Fiscal Year 2020, that requires accounting firms that provide financial statement auditing or audit remediation services in support of the Financial Improvement and Audit Remediation Plan to provide to DoD a statement setting forth the details of any disciplinary proceedings with respect to the accounting firm or its associated persons before any entity with the authority to enforce compliance with rules or laws applying to audit services offered by the accounting firm. DoD policy extends this requirement to firms other than accounting firms.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2019-D010, using any of the following methods:

- o *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for "DFARS Case 2019-D010." Select "Comment" and follow the instructions provided to submit a comment. Please include "DFARS Case 2019-D010" on any attached documents.

- o *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2019-D010 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** Mr. David E. Johnson, telephone 571-372-6115.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is proposing to amend the DFARS to implement section 1006 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 1011 of the NDAA for FY 2020 (Pub. L. 116-92). Section 1006 applies to accounting firms that provide financial statement auditing to

DoD in support of the audit under 31 U.S.C. 3521 or audit remediation services in support of the Financial Improvement and Audit Remediation Plan described in 10 U.S.C. 240b. DoD, as a matter of policy, is extending this requirement to firms other than accounting firms that provide such services. Such firms, when responding to a solicitation or awarded a contract for the acquisition of covered services, must disclose to DoD before any contract action (including award, renewals, and modifications) the details of any disciplinary proceedings with respect to the accounting firm or its associated persons before any entity with the authority to enforce compliance with rules or laws applying to audit services offered by the accounting firm. Section 1011 amended section 1006 to require any disclosures to be treated as confidential to the extent required by the court or agency in which the proceeding occurred and to be treated in a manner consistent with any protections or privileges established by any other provision of Federal law.

DoD received input from one respondent in response to the early engagement opportunity posted on the Defense Acquisition Regulations System webpage for the NDAA for FY 2019. The input was considered in the formulation of the proposed rule.

The rule is expected to have a minor impact as it is expected to apply to approximately a dozen firms.

## **II. Discussion and Analysis**

DoD proposes to add a new paragraph (d) to DFARS 237.270, Acquisition of audit services; a new solicitation provision

252.237-70XX, Preaward Transparency Requirements for Firms Offering to Support Department of Defense Audits—Representation and Disclosure; and a new contract clause at 252.237-70YY, Postaward Transparency Requirements for Firms that Support Department of Defense Audits. The provision will not be included in the annual representations and certifications, because it affects very few offerors and requires update every time an offer is submitted.

For audit remediation services, both accounting and non-accounting firms are able to bid on and perform this work. Section 1006 of the NDAA for FY 2019 only requires that accounting firms providing financial statement auditing or audit remediation services to DoD provide the details on any disciplinary proceedings with respect to the accounting firm or its associated persons. DFARS 237.270(d)(1) specifies that, as a matter of policy, DoD proposes to require this information from any offeror responding to a DoD solicitation for such services, in order to have a level playing field for the competition.

DFARS 237.270(d)(2) specifies that this requirement applies to solicitations and contracts for financial statement auditing required under 31 U.S.C. 3521(e) (as explicitly stated in the statute) and clarifies that the covered audit remediation services are those in support of the Financial Improvement and Audit Remediation Plan described in 10 U.S.C. 240b (based on a reading of section 1006 in conjunction with section 1002 of the

same NDAA for FY 2019).

DFARS 237.270(d)(3) clarifies that the "associated persons" referred to in section 1006 include principals and employees. Federal Acquisition Regulation (FAR) 2.101 defines "principals" to mean an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity.

The solicitation provision at DFARS 252.237-70XX only requires reporting of disciplinary proceedings within the last 3 years that are not yet fully adjudicated or settled or that were fully adjudicated or settled against the offeror. Postaward, prior to each subsequent contract action, the proposed clause at DFARS 252.237-70YY requires contractors to report any changes in previously reported proceedings and any newly initiated proceeding that has not yet been adjudicated or settled, or has been fully adjudicated or settled against the contractor. The provision and the clause each require that the disclosure shall, at a minimum, include the entity hearing the case, the case or file number, and a brief description of the allegation or conduct at issue, and if fully adjudicated or settled, a brief description of the outcome.

The proposed provision and clause also include assurance that the Government will safeguard and treat as confidential all statements provided pursuant to this provision where the statement has been marked "confidential" or "proprietary" by the offeror or contractor. Statements so marked will not be

released by the Government to the public pursuant to a request under the Freedom of Information Act, 5 U.S.C. 552, without prior notification to the offeror or contractor and opportunity for the offeror or contractor to claim an exemption from release. The Government will treat any statement provided pursuant to this provision and clause as confidential to the extent required by any other applicable law.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items**

Consistent with the determinations that DoD made with regard to application of the requirements of section 1006 of the NDAA for FY 2019, as amended by section 1011 of the NDAA for FY 2020, DoD does not intend to apply the requirements of section 1006 of the NDAA for FY 2019 to contracts at or below the SAT, but does intend to apply the rule to contracts for the acquisition of commercial items, excluding COTS items.

#### *A. Applicability to Contracts at or Below the Simplified Acquisition Threshold*

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not

in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD does not intend to make that determination. Therefore, this rule will not apply at or below the simplified acquisition threshold.

*B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items*

10 U.S.C. 2375 exempts contracts and subcontracts for the acquisition of commercial items (including COTS items) from provisions of law enacted after October 13, 1994, that, as determined by the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), set forth policies, procedures, requirements, or restrictions for the acquisition of property or services unless—

- The provision of law—
  - Provides for criminal or civil penalties;
  - Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 2533a or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 2533b; or
  - Specifically refers to 10 U.S.C. 2375 and states that it shall apply to contracts and subcontracts for the

acquisition of commercial items (including COTS items);

or

- USD(A&S) determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial items from the applicability of the provision.

This authority has been delegated to the Principal Director, DPC.

Although sections 1006 and 1011 do not refer to 10 U.S.C. 2375 or state that these sections apply to contracts and subcontracts for the acquisition of commercial items, the types of audit services targeted by the law generally are commercial services. If commercial items are exempted, the statutes will be without effect, undermining the overarching public policy purpose of the law. Therefore, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, excluding COTS items, as defined at FAR 2.101.

#### **IV. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and



benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

## **V. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of interim or final the rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

## **VI. Regulatory Flexibility Act**

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule is expected to apply to approximately a dozen entities. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement section 1006 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), as amended by section 1011 of the NDAA for FY 2020 (Pub. L. 116-92), and DoD policy to provide a

level playing field among firms that provide audit services, whether accounting firms or other than accounting firms.

Section 1006 applies to accounting firms that provide financial statement auditing or audit remediation services to DoD in support of the audit under 31 U.S.C. 3521 or audit remediation services in support of the Financial Improvement and Audit Remediation Plan described in 10 U.S.C. 240b. Such firms, when responding to a solicitation or awarded a contract for the acquisition of covered services, must disclose to DoD before any contract action (including award, renewals, and modifications) the details of any disciplinary proceedings with respect to the accounting firm or its associated persons before any entity with the authority to enforce compliance with rules or laws applying to audit services offered by the accounting firm. DoD policy extends this requirement to firms other than accounting firms, in order to provide a level playing field in competitive acquisitions.

DoD estimates there are 12 respondents that submit offers and 10 respondents that receive award of one or more contracts covered by this rule. Of the estimated 12 respondents, DoD further estimates that only two of these respondents are small entities.

This rule proposes to add a solicitation provision and a contract clause that require details of any disciplinary proceedings with respect to the firm or its associated persons

before any contract action on a covered contract in support of DoD audits.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD considered applying the rule to only accounting firms, but that would create a situation in which the rule would not apply to other firms that also provide these services, leading to unfair competitions. Applying the rule to other than accounting firms does not create a significant burden for small entities.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2019-D010), in correspondence.

## **VII. Paperwork Reduction Act**

The rule contains information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35). Accordingly, DoD has submitted a request for approval of a new information collection requirement concerning Requirement for Firms Used to Support Department of Defense Audits (DFARS Case 2019-D010) to OMB. The DFARS rule adds a new documentation submission and reporting requirement.

A. Public reporting burden for this collection of information is estimated to average approximately 0.27 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden estimated as follows:

*Respondents:* 18.

*Responses per respondent:* 23.

*Total annual responses:* 414.

*Preparation hours per response:* 0.27 hours, approximately.

*Total response burden hours:* 113.

B. Request for Comments Regarding Paperwork Burden.

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Susan Minson at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email [Susan\\_M.\\_Minson@omb.eop.gov](mailto:Susan_M._Minson@omb.eop.gov), with a copy to the Defense Acquisition Regulations System, Attn: Mr. David E. Johnson, OUSD(A&S)DPC/DARS, Room 3B938, 3060 Defense Pentagon, Washington, DC 20301-3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Mr. David Johnson, OUSD(A&S)DPC/DARS, Room 3B938, 3060 Defense Pentagon, Washington, DC 20301-3060, or email [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2019-D010 in the subject line of the message.

**List of Subjects in 48 CFR Parts 212, 237, and 252**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 212, 237, and 252 are proposed to be amended as follows:

1. The authority citation for parts 212, 237, and 252 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 212—ACQUISITION OF COMMERCIAL ITEMS**

2. Amend section 212.301 by adding paragraphs (f) (xiii) (C) and (D) to read as follows:

**212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

\* \* \* \* \*

(f) \* \* \*

(xiii) \* \* \*

(C) Use the provision at 252.237-70XX, Preaward Transparency Requirements for Firms Offering to Support Department of Defense Audits—Representation and Disclosure, as prescribed in 237.270(e) (3), to comply with section 1006 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) and section 1011 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

(D) Use the clause at 252.237-70YY, Postaward Transparency Requirements for Firms that Support Department of Defense Audits, as prescribed in 237.270(e) (4), to comply with section 1006 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) and section 1011 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

\* \* \* \* \*

**PART 237—SERVICE CONTRACTING**

3. Amend section 237.270 by—

a. Redesignating paragraph (d) as paragraph (e);

- b. Adding a new paragraph (d); and
- c. Adding paragraphs (e) (3) and (4).

The additions read as follows:

**237.270 Acquisition of audit services.**

\* \* \* \* \*

(d) *Transparency requirement for firms used to support DoD audits.* (1) This paragraph (d) implements the requirements of section 1006 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) and section 1011 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92) for transparency of accounting firms used to support DoD audits; and extends the statutory requirement, as a matter of DoD policy, to firms other than accounting firms in order to ensure consistent availability of data for contracting officer evaluation and appropriate use.

(2) This requirement applies to solicitations and contracts for—

(i) Financial statement auditing required under 31 U.S.C. 3521(e); or

(ii) Audit remediation services in support of the Financial Improvement and Audit Remediation Plan described in 10 U.S.C. 240b.

(3) Any firm responding to a solicitation or awarded a contract for the acquisition of the services described in paragraph (d) (2) of this section is required to represent with regard to whether it has been subject to disciplinary

proceedings within the last 3 years and, if the offeror represents that it has, to disclose to DoD before any contract action (including award, renewals, and modifications)–

(i) The details of any disciplinary proceedings, with respect to the firm or its associated persons (including principals and employees), before an entity with the authority to enforce compliance with rules or laws applying to audit services or audit remediation services offered by accounting firms or firms other than accounting firms; and

(ii) For subsequent contract actions after contract award, whether there has been any change with regard to previously reported disciplinary proceedings since the last contract action.

(e) \* \* \*

(3) Use the provision at 252.237-70XX, Preaward Transparency Requirements for Firms Offering to Support Department of Defense Audits–Representation and Disclosure, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, that include the clause at 252.237-70YY, Postaward Transparency Requirements for Firms that Support Department of Defense Audits.

(4) Use the clause at 252.237-70YY, Postaward Transparency Requirements for Firms that Support Department of Defense Audits, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that–



- (i) Exceed the simplified acquisition threshold; and
- (ii) Are for the acquisition of financial statement auditing or audit remediation services as described in paragraph (d) (2) of this section.

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

**252.237-7000 [Amended]**

- 4. Amend section 252.237-7000 introductory text by removing “237.270(d)(1)” and adding “237.270(e)(1)” in its place.

**252.237-7001 [Amended]**

- 5. Amend section 252.237-7001 introductory text by removing “237.270(d)(2)” and adding “237.270(e)(2)” in its place.
- 6. Add section 252.237-70XX to read as follows:

**252.237-70XX Preaward Transparency Requirements for Firms Offering to Support Department of Defense Audits—Representation and Disclosure.**

As prescribed in 237.270(e)(3), use the following provision:  
PREAWARD TRANSPARENCY REQUIREMENTS FOR FIRMS OFFERING TO SUPPORT  
DEPARTMENT OF DEFENSE AUDITS—REPRESENTATION AND DISCLOSURE (DATE)

(a) *Representation.* The Offeror represents that within the 3-year period preceding this offer, the Offeror and/or any of its principals or employees have [ ] have not [ ] been the subject of disciplinary proceedings before an entity with the authority to enforce compliance with rules or laws applying to audit services or audit remediation services offered by the Offeror, that—

- (1) Are not yet fully adjudicated or settled; or

(2) Were fully adjudicated or settled against the Offeror and/or its principals or employees.

(b) *Disclosure.* If the Offeror checked "have" in the representation in paragraph (a) of this provision, the Offeror shall, at a minimum, disclose for each such proceeding—

- (1) The entity hearing the case;
- (2) The case or file number; and
- (3) The allegation or conduct at issue and, if fully adjudicated or settled, a brief description of the outcome.

(c) The Government will safeguard and treat as confidential all statements provided pursuant to this provision where the statement has been marked "confidential" or "proprietary" by the Offeror. Statements so marked will not be released by the Government to the public pursuant to a request under the Freedom of Information Act, 5 U.S.C. 552, without prior notification to the Offeror and opportunity for the Offeror to claim an exemption from release. The Government will treat any statement provided pursuant to this provision as confidential to the extent required by any other applicable law.  
(End of provision)

7. Add section 252.237-70YY to read as follows:

**252.237-70YY Postaward Transparency Requirements for Firms that Support Department of Defense Audits.**

As prescribed in 237.270(e)(4), use the following clause:  
POSTAWARD TRANSPARENCY REQUIREMENTS FOR FIRMS THAT SUPPORT  
DEPARTMENT OF DEFENSE AUDITS (DATE)

(a) Prior to each contract action under this contract (including renewal or modification), the Contractor shall disclose the details of any disciplinary proceedings, with respect to the firm and/or its principals or employees, before an entity with the authority to enforce compliance with rules or laws applying to audit services or audit remediation services offered by the Contractor, and whether there has been any change with regard to previously reported proceedings since the last contract action.

(b) The disclosure shall, at a minimum, include—

(1) The entity hearing the case;

(2) The case or file number; and

(3) A brief description of the allegation or conduct at issue and, if fully adjudicated or settled, a brief description of the outcome.

(c) The Government will safeguard and treat as confidential all statements provided pursuant to this clause where the statement has been marked "confidential" or "proprietary" by the Contractor. Statements so marked will not be released by the Government to the public pursuant to a request under the Freedom of Information Act, 5 U.S.C. 552, without prior notification to the Contractor and opportunity for the Contractor to claim an exemption from release. The Government will treat any statement provided pursuant to this clause as confidential to the extent required by any other applicable law.

(End of clause)

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